Supreme Court, U.S.
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No. 01-1479

In The

# Supreme Court of the United States

GENERAL MOTORS CORPORATION,

*Petitioner,*

v.

PAMELA R. GOODWIN,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit**

## BRIEF IN OPPOSITION

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## INTRODUCTION

The petitioner General Motors Corporation ("GM") asserts that the Court should grant a writ of certiorari to consider a split among the circuits on the proper application of this Court's decision in *Bazemore v. Friday*, 478 U.S. 385 (1984), to Title VII's filing requirement in cases involving continuing discrimination in salary. In asserting its arguments, however, the petitioner ignores a critical fact that is discussed in the opinion by the United States Court of Appeals for the Tenth Circuit.

At the time she filed her charge, Ms. Goodwin worked for GM as a labor relations representative. She had first been appointed to that position in late 1991. App. at 4a. At the time of her promotion, she was given a salary more than three hundred dollars per month lower than the white employees who held the same position. That salary disparity grew over a period of years to more than five hundred dollars monthly. App. at 5a. As the court of appeals discussed, GM maintained a policy requiring employees to keep salary information confidential. That policy kept Ms. Goodwin from discovering the disparity in her salary until March of 1998. App. at 5a-6a. At that time, she received a printout showing the salaries of all of the employees in her department. She filed her charge with the Equal Employment Opportunity Commission within 300 days of learning of the disparate treatment. The suppression of salary information was a factor considered by the Tenth Circuit in determining that Ms. Goodwin timely filed her charge. App. at 11a.

GM asserts that decisions from the Seventh and Eleventh Circuits conflict with the decision below. However, GM ignores the critical fact that GM's confidentiality

policy kept Ms. Goodwin from knowing that she had been continually subjected to disparate treatment during her service has a labor relations representative. In this opposition, Ms. Goodwin will demonstrate that the Seventh Circuit and all courts of appeals that have considered the issue would have concluded that Ms. Goodwin timely filed her charge of discrimination. Accordingly, the instant case raises no split of authority among the circuits.

The petitioner also seeks a ruling that would limit back pay to 300 days, not two years, as provided by 42 U.S.C. § 2000e-5(g)(1). That argument is at odds with the statute's plain language and with this court's contrary ruling in *National Railroad Passenger Corporation v. Morgan*, 122 S. Ct. 2061 (2002), and thus provides no basis for review.

## REASONS FOR DENYING THE WRIT

### I. Every Court Of Appeals Would Reach The Same Conclusion As Did The Tenth Circuit On The Facts Presented Here.

GM argues for an interpretation of the filing requirements under Title VII that would insulate salary decisions from liability for discrimination as long as the employer is able to conceal the relative salary level of its employees for more than 300 days. Pamela Goodwin did not know that she was paid less than her co-workers until she received a document showing the compensation paid to all of the labor relations representatives. App. at 5a-6a. This crucial fact demonstrates that, as applied to this case, there is no split of authority among the circuits. Indeed, if faced with the fact that GM's confidentiality policy concealed the

race-based disparity in wages, the Seventh and Eleventh Circuits would have ruled just as the Tenth Circuit did. Because Ms. Goodwin filed her EEOC charges within 300 days of discovering the race-based pay disparity, those circuits, and indeed, all circuits that have considered *Bazemore*'s analysis of wage discrimination, would have ruled that Ms. Goodwin's claim was timely.

In *Dasgupta v. University of Wisconsin Board of Regents,* 121 F.3d 1138 (7th Cir. 1992), the principal case upon which the petitioner relies, the court defined a continuing violation as follows:

> A continuing violation is one that **could not reasonably have been expected** to be made the subject of a lawsuit when it first occurred because its character as a violation **did not become clear** until it was repeated during the limitations period. *Id.* at 1139. (emphasis added)

The character of GM's discrimination against Ms. Goodwin did not become clear until she received the document identifying the race-based disparity in her salary. She might have been dissatisfied with her salary, but she had no reason to know that she was paid significantly less than her white peers until she received the salary document.

Similarly, the Eleventh Circuit in *Carter v. West Publishing Co.,* 225 F.3d 1258 (11th Cir. 2000), considered, but rejected a traditional tolling analysis of the plaintiff's claims for discrimination in the administration of the employee stock ownership plan. The court referred to evidence that the plaintiffs were well aware, before the

limitations period, that women were denied the opportunity to purchase stock. To the contrary, here, the Tenth Circuit recognized that, as a result of GM's confidentiality policy, Ms. Goodwin was not aware that she was paid less than her white peers until fewer than 300 days before she filed her EEOC charges. App. at 6a. Given the effective suppression of salary information by GM's confidentiality policy, the Eleventh Circuit would have also concluded that Ms. Goodwin timely filed her charge after first learning of the race-based disparity in her salary.

Other cases from the Seventh and Eleventh Circuits show that the same result would have occurred had Ms. Goodwin's case been heard in those courts. For example, in *Wagner v. Nutrasweet Co.*, 95 F.3d 527 (7th Cir. 1996), the Seventh Circuit concluded that the plaintiff could properly bring a claim for payroll discrimination because she received discriminatory salary payments within the period for filing a Title VII claim. The plaintiff had received a severance package in return for which she had waived all claims for employment discrimination. Following the waiver of her claims, she was placed in a temporary position during a transition period with the company. The salary in the transitional position was based on the salary she received prior to the execution of the waiver. That salary was less than the salary received by similarly situated males. The company argued that she could not allege discrimination in salary because she had waived all claims for discrimination regarding her pre-severance compensation. The Seventh Circuit, however, relying on *Bazemore*, concluded that each paycheck Wagner received at a level lower than her peers constituted a new violation.

Authority showing that the Eleventh Circuit would have reached the same result as did the Tenth Circuit is

found in *Calloway v. Partners National Health Plans*, 986 F.2d 446 (11th Cir. 1993). In *Calloway*, the court considered the application of the *Bazemore* rule to a plaintiff who had been hired at a salary level lower than her white predecessor. The hiring occurred more than 300 days before a claim alleging wage discrimination was filed. The district court had ruled that the continuing disparity in wages was merely an effect of the prior discrete act of hiring her at a lower salary. The Eleventh Circuit reversed, following *Bazemore,* to conclude that each paycheck should be counted as a new violation. Similarly, the Eleventh Circuit, if faced with the fact that GM had set Ms. Goodwin's salary as a labor relations representative significantly lower than her white peers, and that it continued to pay her at a lower rate, would have concurred with the Tenth Circuit that each paycheck at the lower amount constituted a new violation.

Because the authorities in the Seventh and Eleventh Circuits show that those courts would have reached the same result as the Tenth Circuit, there is to be no split of authority over the timeliness issue raised by Ms. Goodwin's claims. Moreover, a review of the authority in each of the circuits that have reached the issue reveals that the result would likely have been the same in those courts. *See, e.g., Pollis v. New School for Social Research*, 132 F.3d 115 (2d Cir. 1997) (applying *Bazemore* to a claim for ongoing salary discrimination); *Cardenas v. Massey,* 269 F.3d 251 (3d Cir. 2001) (applied *Bazemore* to claim for a discriminatory application of pay classifications to an individual); *Brinkley-Obu v. Hughes Training*, 36 F.3d 336 (4th Cir. 1994) (applied *Bazemore* to Title VII and Equal Pay Act claims); *Ashley v. Boyles Famous Corned Beef*, 66 F.3d 164 (8th Cir. 1995) (followed *Bazemore* to permit

claim for pay discrimination based on gender segregated job classifications); *Anderson v. Zubieta*, 180 F.3d 329 (D.C. Cir. 1999) (applied *Bazemore* to ongoing pay discrimination).

Because there is no split of authority among the circuits, the petition should be denied.

## II. This Court's Decisions Leave No Doubt To The Proper Application Of Title VII's Filing Requirements To Claims For Unequal Wages.

In *Bazemore v. Friday*, this Court taught that pay discrimination that began during a period in which a claim would be barred, but persists into a period in which the claim would be timely, continues to be actionable under Title VII: "Each week's paycheck that delivers less to a black than to a similarly situated white is a wrong, actionable under Title VII, regardless of the fact that this pattern was begun prior to the effective date of Title VII." 478 U.S. at 396. As discussed above, the courts of appeals have consistently applied the above rule to claims for pay discrimination so long as the disparate treatment continues into the filing period for relief under Title VII.

The petitioner suggests that other precedents of this Court lead to a different result. GM points to *United Air Lines v. Evans*, 431 U.S. 533 (1977); *Delaware State College v. Ricks*, 449 U.S. 250 (1980); and *Lorance v. AT&T Tech., Inc.*, 490 U.S. 900 (1989), as authority for the point that continuing effects of past discrimination are not actionable if the past discrimination occurred before the filing deadline for Title VII claims. Each of those cases, however, involved a discrete act of discrimination other than the establishment of a salary. Once a professor has

been denied tenure, as in *Ricks*, or a flight attendant has been forced to resign, as in *Evans*, the discriminatory act has occurred.

*Lorance v. AT&T* turned on the special treatment Congress has given seniority systems in the discrimination laws. The plaintiffs presented evidence in *Lorance* that the seniority system to which they had been subjected had been implemented with a discriminatory purpose. The plaintiffs did not assert that the seniority system was discriminatory on its face. Because of the special treatment accorded seniority systems and the reliance of other employees on the facially neutral system, the Court determined that the statute of limitations began to run from the date of the alleged discriminatory act – the implementation of the seniority system – rather than the date upon which its effects were felt.[1] 490 U.S. at 211-12.

This Court recently considered continuing violations in the context of Title VII, but set forth no reason to question its holding in *Bazemore*. In *Morgan, supra*, 122 S. Ct. 2061, the Court concluded that the time limit for filing a charge of discrimination begins to run with each discrete act of discrimination by an employer. The Court acknowledged that *Bazemore* teaches that each discriminatory paycheck is a discrete act of discrimination. *Id.* at 2071. Having just recently cited *Bazemore* as controlling law on the accrual of claims for wage discrimination, the Court need not revisit the issue here.

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[1] Congress has since acted to reverse the effect of *Lorance*. *See* 42 U.S.C. § 2000e-5(e)(2); *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792 (11th Cir. 1992), in which the court noted that one purpose of the 1991 amendments to the Civil Rights Act was to reverse the holding in *Lorance*.

The continuing viability of *Bazemore*'s timeliness rule to claims for pay discrimination is demonstrated by its application to the facts of Ms. Goodwin's case. Ms. Goodwin worked in an environment in which company policy prevented her from knowing of the salary level that her co-workers received. Disparate treatment by definition requires one to consider the treatment of one person relative to the treatment accorded another. When a non-minority receives a promotion over a minority, it is entirely clear that the minority employee has been treated differently than the non-minority employee. Similarly, a woman who is required to resign because of marriage, when a male co-worker is not, knows that she has been treated differently.

Many employees, like Ms. Goodwin, do not know the salary that their co-workers receive. They do not know whether they are treated differently. Abandonment of the *Bazemore* rule in these circumstances would allow an employer to intentionally discriminate against an employee in setting his or her salary, hide the discrimination under the guise of salary confidentiality, and after one hundred eighty days, perpetuate the discrimination without fear of accountability under the discrimination laws. This is certainly not the result intended by Congress.

The rule announced in *Bazemore* prevents employers from perpetuating discriminatory salary levels. It has been consistently applied by the courts of appeals to claims involving salary discrimination. The Court should deny the petition for certiorari.

## III. The Second Question Presented Has Been Waived And, In Any Event Was Definitively Answered In *Morgan*.

Petitioner argues that § 2000e-5(e)'s period for filing a timely charge also functions as a limitation on the availability of a back pay award. In other words, Petitioner maintains that because a plaintiff must file an administrative charge with the EEOC within 300 days after an alleged act of discrimination, an employer cannot be liable for back pay for more than 300 days prior to the filing of the administrative charge. This question is not worthy of review for two reasons.

First, Petitioner has waived this argument. Petitioner complains that the provision of Title VII governing back pay liability, 42 U.S.C. § 2000e-5(g)(1), which provides back pay for up to two years, not 300 days, prior to the filing of the charge, was not relied upon by the court below. Pet. 24 n.3. And for good reason. The court of appeals did state the correct rule regarding back pay liability, Pet. App. 12a, but it did not specifically address whether § 2000e-5(e) circumscribes the period of back pay liability because Petitioner did not raise this argument in either the district court or the court of appeals. It is a long-established principle that, absent unusual circumstances, this Court will not address arguments neither presented nor decided below. *See, e.g., TRW, Inc. v. Andrews*, 122 S. Ct. 441, 451 (2002); *Pennsylvania Department of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998); *Dothard v. Rawlinson*, 433 U.S. 321, 323, n.1 (1977); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted); *Duignan v. United States*, 274 U.S.

195, 200 (1927). Therefore, this Court should decline to address the second question.

Second, this Court recently concluded in *Morgan* that the specific two-year limitation on back pay shows that § 2000e-5(e)'s timely filing requirement was *not* intended to serve as a limitation on back pay liability. *See Morgan*, 122 S. Ct. at 2075 ("If Congress intended to limit liability to conduct occurring in the period within which the party must file the charge, it seems unlikely that Congress would have allowed recovery for two years of back pay."). Put otherwise, "the timely filing provision was not meant to serve as a specific limitation . . . on damages," but is simply "one in a series of provisions requiring that the parties take action within specified time periods." *Id.*

Petitioner's reading of the timely-filing requirement would nullify Title VII's two-year back pay provision, since it would limit back pay to 300 days in almost all instances, a problem tacitly admitted in Petitioner's footnoted reference to § 2000e-5(g)(1). See Pet. 24 n.3. Petitioner claims that § 2000e-5(g)(1) was a response to the EEOC's original position that liability could extend to the effective date of Title VII. Even if true, this does not advance petitioner's argument. Whatever the impetus for § 2000e-5(g)(1), Congress chose to limit back pay liability for two years, not 300 days.

Recognizing that its position renders § 2000e-5(g)(1)'s two-year back pay provision nearly meaningless, Petitioner attempts to give that provision substance by arguing that it "continues to cap recovery of back pay where equitable considerations toll or delay accrual of the limitations period." Pet. 24 n.3. That argument makes no sense

because Title VII contains *no* express limitation on the two-year period and does not remotely suggest that the two-year rule survives only in cases where equitable principles, such as tolling or estoppel, are applicable. In any event, *Morgan* has already rejected this view. The time period for filing a charge is itself "subject to equitable doctrines such as tolling or estoppel." *Morgan*, 122 S. Ct. at 2072. Petitioner provides no statutory basis for holding that the two-year back pay provision is meant to accommodate these same considerations.

## CONCLUSION

For each of the reasons set forth above, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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